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# Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
*Petitioners,*

*v.*

KELLY, *et al.*,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## BRIEF OF AMICUS CURIAE PENNSYLVANIANS FOR MODERN COURTS IN SUPPORT OF AFFIRMANCE

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## INTEREST OF AMICUS CURIAE

Pennsylvanians for Modern Courts ("PMC"), a non-partisan, nonprofit Pennsylvania corporation, is an educational and charitable organization formed with the express purpose of studying the judicial system of the Commonwealth of Pennsylvania and possible reforms and improvements of that system. In furtherance of this mission, PMC has advocated reforms of Pennsylvania's judicial selection system, which is an elective system similar to that of Minnesota. Of particular relevance to this case, PMC appeared as *amicus curiae* before the Third Circuit Court of Appeals in *Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 944 F.2d 137 (3d Cir. 1991), a case that presented substantially the same issues as are presently before the Court.

The "announce clause" of Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct, which the decision below upheld, is identical to the announce clause of Canon 7(B)(1)(c) of the Pennsylvania Code of Judicial Conduct. PMC files this *amicus curiae* brief in support of affirmance of the decision below out of its concern that if the announce clause is held unconstitutional, public confidence in the impartiality and integrity of the judiciary in Pennsylvania, as well as in Minnesota and other jurisdictions, will be gravely undermined.[1]

## STATEMENT OF THE CASE

PMC accepts and adopts the statement of the case as set forth in the Brief for Respondents Kelly, *et al.*

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1. This *amicus curiae* brief is filed with the written consent of all parties, which has been separately filed with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

Petitioners and the *amici* supporting them portray the announce clause of Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct as, alternatively, an assault on Minnesota's elective judicial system or a well-meaning but grossly overbroad proscription of speech that requires judicial candidates to remain completely silent regarding their general views on virtually all substantive issues.[2] PMC respectfully submits that, in so arguing, petitioners and the amici supporting them misidentify the interest at issue in this case and misread to the point of destroying the announce clause.

There are two issues before the Court: whether Minnesota has a compelling interest that is furthered by the announce clause, and, if so, whether the clause is narrowly tailored to further that interest. As discussed below, the announce clause is constitutional and the decision of the Eighth Circuit Court of Appeals should be affirmed. Minnesota has an indisputably compelling interest in maintaining an impartial judiciary. As construed by the courts below and by the Minnesota Supreme Court, the announce clause is narrowly tailored to serve that interest.

The bedrock principle of our Nation is that it is a government of laws, not of men. The very essence, the

2. The first argument is pressed primarily in the brief of petitioners Gregory F. Wersal, *et al.*, which maintains that the announce clause "completely circumvents the purpose and structure of the Minnesota elective judicial system—[h]olding Minnesota judges accountable to the electorate every six years in open, competitive elections." Brief for Petitioners Gregory F. Wersal, *et al.*, at 12. Petitioners Republican Party of Minnesota, *et al.*, on the other hand, seemingly concede that the announce clause seeks to protect judicial impartiality rather than to undermine Minnesota's elective judicial system, but argue that the clause goes "too far" by prohibiting judicial candidates' discussion of their "general views of the law." Brief for Petitioners Republican Party of Minnesota, *et al.*, at 2-3. Other *amici* supporting petitioners make similar arguments, which are discussed below.



definition, of the rule of law is that each case will be judged—and will be perceived to have been judged—without prejudice or predisposition but rather on its own merits. Thus, without an impartial judiciary in fact and appearance, there can be no rule of law. Contrary to the suggestion of petitioners and the *amici* supporting them, the concept of impartiality is neither inconsistent with, nor diluted in the context of, an elective judicial system, even if in practice it may be undermined in such a system. Impartiality is an essential component of every judiciary—federal or state, appointed or elected. It is difficult to imagine a more compelling state interest than Minnesota's interest in protecting the impartiality of its judiciary.

It follows that Minnesota and other states with elected judiciaries, including Pennsylvania, are entitled to regulate, within narrow confines, the rhetoric of judicial campaigns. Permitting judicial candidates to troll for votes with announcements of their predispositions on issues likely to come before them if they are elected undermines public confidence in the impartiality of the judiciary and condones the prejudgment of cases, which is anathema to our system of justice. The announce clause is therefore necessary to advance states' compelling interest in ensuring the impartiality of, and public confidence in, an elected judiciary.

Minnesota's announce clause is narrowly tailored to advance this compelling state interest. Petitioners and Circuit Judge Beam in dissent below portray the announce clause as an unlimited proscription of all substantive speech. This argument has been effectively foreclosed by a recent order of the Minnesota Supreme Court adopting the narrow construction of the announce clause set forth in the Eighth Circuit's opinion in this case. Moreover, such a broad construction is not compelled by the plain meaning of the clause and contravenes the clause's purpose to protect the impartiality of the judiciary. Under the narrow construction definitively adopted by the Minnesota Supreme Court, the announce clause prohibits only announcements of candi-

dates' conclusions or predispositions on issues likely to come before them if elected.

Thus understood, the announce clause leaves a broad field of issue-related speech open to judicial candidates: candidates may discuss their knowledge of the law and of judicial precedents, arguments pro and con on disputed legal and political issues, matters of judicial philosophy, and the like. All that is prohibited are announcements of predispositions to rule in a particular way on specific issues that are likely to come before the court. Far from an unworkable or unconstitutionally vague standard, this has been the line walked in confirmation proceedings by many of the Justices of this Court without fear of sanction.

In short, the announce clause protects the impartiality of Minnesota's judiciary and is neither inconsistent with the elective judicial system nor the all-encompassing gag rule that its opponents portray. Rather, it proscribes a narrow category of judicial campaign rhetoric that in and of itself reflects the candidate's unfitness to serve in any judicial system. The announce clause therefore does not violate the First and Fourteenth Amendments of the United States Constitution. The decision below should be affirmed.

## ARGUMENT

The announce clause of Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct is undoubtedly a constraint imposed by the state on judicial candidates' First Amendment right to free speech. Because "[f]reedom of speech reaches its high-water mark in the context of political expression," the court below invoked strict scrutiny and, applying that standard, determined that the announce clause is narrowly tailored to serve a compelling state interest. *See Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 861, 864, 883 (8th Cir. 2001).

PMC accepts this level of review. Two issues, therefore, are before the Court: whether Minnesota has a compelling interest that is furthered by the announce clause, and, if so,



whether the clause is narrowly tailored to further that interest. Each of these issues is addressed below.

### I. MINNESOTA'S INTEREST IN THE ACTUAL AND PERCEIVED IMPARTIALITY OF ITS JUDICIARY IS COMPELLING

#### A. The Interest At Stake Is The Impartiality Of The Judiciary, Not The Integrity Of Minnesota's Elective Judicial System

Petitioners' fundamental error, the error that throws their entire argument askew, is to misstate the interest at stake in this case. "This case," petitioners contend, "is . . . about the integrity of the selection process the people of Minnesota have adopted for its judicial officials—popular election . . . ." Pet. for Writ of Certiorari, at 14. *See also* Brief for Petitioners Gregory F. Wersal, *et al.*, at 12. That is not what this case is about. Rather, this case is about the integrity of the bedrock of our Nation: the rule of law. It is about the fundamental requirement that judges decide —and be perceived to have decided—cases on the facts and law before them rather than on prejudice and bias. The fact that judges in Minnesota (as in Pennsylvania and other states) are elected does not alter the state's fundamental and compelling interest in protecting the actual and perceived impartiality of its judiciary. Judges, in other words, are different from governors or legislators. *See Kelly*, 247 F.3d at 862; *Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 944 F.2d 137, 142 (3d Cir. 1991) ("The functioning of the judicial system differs markedly from those of the executive and legislative."); *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech.").

Very early in our history, this Court, through Chief Justice Marshall, identified the rule of law as a cardinal principle:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. * * * The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). But the laws can furnish no remedy without the public's confidence in the impartiality of the judiciary, for, absent that confidence, the judiciary has no power, has "neither Force nor Will, but merely judgment, and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The power of the judiciary—whether federal or state, appointed or elected—depends upon the public's respect for its judgments, which in turn depends upon the public's confidence in its impartiality:

> [The requirement of neutrality in adjudicative proceedings] preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done, by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

*Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal citation and quotation marks omitted).

What this case is about, then, is the efficacy of courts' judgments, not the integrity of, or any encroachment upon,



Minnesota's prerogative to have an elected judiciary. It is about whether Minnesota's citizens, and the citizens of other states with elected judiciaries, will accept their judges' decisions as disinterested and impartial, as based on principles of law and the facts presented, as reached without fear or favor, as untainted by explicit or implicit commitments made under the pressure to win votes.

### B. Neither The Announce Clause Nor The Concept Of Impartiality Encroaches Upon Minnesota's Elective Judicial System

In petitioners' view, the announce clause may be appropriate in the context of an "independent" judiciary, but it is inconsistent with the concept of an elected, "dependent" judiciary. Brief for Petitioners Gregory F. Wersal, *et al.*, at 16-17. *See also* Brief of *Amici Curiae* State Supreme Court Justices, at 6-9. Because elected judiciaries are, according to petitioners, by their very nature politically dependent, judicial candidates should and must be free to announce their views on issues likely to come before them if elected—how else can the electorate be expected to make meaningful and informed choices at the ballot box? *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 29-31.

Petitioners' view that the announce clause is inconsistent with the elective judicial system is stated with particular clarity by *amici* State Supreme Court Justices. "The recurring election of jurists," they say,

> is such a fundamental departure from the federal model that it is often a mistake to adopt federal norms as the standard for jurists in an elective system. Instead, elections create their own baseline norms about the proper role of elected jurists, the nature and scope of judicial independence, and the requirements of judicial integrity. * * * Unlike the federal courts, which primarily focus on interpreting rules created by the Constitution, statutes, and regulations, state courts

> have the added power and responsibility to create substantive rules governing behavior across a wide spectrum of daily life. * * * Whatever the merit of the federal ideal of a wholly independent judiciary, elected state courts, by design, are *not* independent of the electorate. The very point of elections is to make jurists accountable for their decisions by subjecting them to repeated tests at the ballot box. * * * This Court thus should resist relying on familiar norms of judicial independence from the federal courts and give thorough consideration to the structural and conceptual limits on judicial independence that flow from the existence of recurring elections and enhanced law-making authority.

Brief of *Amici Curiae* State Supreme Court Justices, at 6-9 (citations omitted, emphasis in original).

Thus, according to *amici*, "a certain degree of political responsiveness is not only permissible, but is an intrinsic and expected element of the elective judicial role." *Id.* at 4. Although PMC profoundly disagrees with this analysis, its candor is nevertheless to be welcomed, for its assumptions and conclusions shake the very foundation of any system of justice. One of the great services this Court can render by its decision in this case is to make clear that there are no such differences between federal and elected state judiciaries.

Swept along by their emphasis on the fact that Minnesota judges are elected, petitioners and the *amici* supporting them frame the issue in this case in the starkest terms, succinctly stated by Circuit Judge Beam in dissent below:

> It may be, as a matter of policy, that an appointed judiciary best protects our liberties. I certainly think so, and the court obviously agrees. But Minnesota has made a different choice, and having chosen an elective selection method it cannot then turn around and quash candidates' constitutionally guaranteed rights. The



> upshot is this: when a state opts to hold an election, it must commit itself to a complete election, replete with free speech and association.

*Kelly*, 247 F.3d at 897 (Beam, J., dissenting). The only constraint *amici* State Supreme Court Justices are willing to accept is that judicial candidates may be prohibited from explicitly promising to violate "non-discretionary judicial duties." Brief of *Amici Curiae* State Supreme Court Justices, at 28-30. In all other matters, *amici* say, judicial candidates must be free to speak without constraint.

Petitioners' portrayal of the announce clause as inconsistent with, and a frontal attack on, the elective judicial system is the consequence of their misstatement of the issue. The purpose and effect of the announce clause is to protect the *impartiality* of the judiciary, not to undermine the elective method of selecting judges. Impartiality is simply not a norm more or less applicable depending on the method of judicial selection; it is necessary to any judicial system. *See, e.g., Weiss v. United States*, 510 U.S. 163, 178 (1994) (Rehnquist, C.J.) ("A necessary component of a fair trial is an impartial judge."); *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring) ("One of the very objects of law is the impartiality of its judges in fact and appearance."); *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) ("[T]he impartiality of the adjudicator goes to the very integrity of the legal system . . . ."); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (recognizing due process right to an impartial judge).

The First Amendment does not compel a choice between an independent, appointed judiciary and an elective judicial system marked by campaign rhetoric that inevitably undermines the actual and perceived impartiality of the judiciary. Rather, the First Amendment permits a third approach: judicial candidates may be prohibited from undermining the impartiality of the judiciary by stating their predispositions or conclusions on issues likely to come

before them if elected.[3] Petitioners and the *amici* supporting them confuse the concepts of impartiality, accountability, and independence. Only the first is at issue in this case.

To be sure, elected judges are "accountable for their decisions" in the sense that they may be removed from office in the next election. But this type of accountability has nothing to do with the impartiality required of all judges. Upon being elected, as upon being appointed, a judge must be completely impartial. Thus, judges are not, in the true sense of the word, accountable to the electorate; they are accountable only to the rule of law. They are obliged, in other words, to decide every case impartially, on its merits, and in accordance with the law.

Nor is there any difference between federal and state judges' "independence." Contrary to *amici* State Supreme Court Justices' suggestion, elected judges are not permitted, in deference to the electorate, less independence than are appointed judges. A judge's duty to be "independent" means that the judge, whether elected or appointed, is to decide every case impartially, as the law requires, independent of all other considerations, including how the decision might be viewed by the electorate. *Amici* State Supreme Court Justices' error, like the error of petitioners, is to misstate the issue in this case.

In short, this case has nothing to do with states' prerogative to choose an elected judiciary or with any supposed difference between the norms applicable to appointed and elected judges. It is about Minnesota's ability to further its compelling interest in protecting the actual and perceived impartiality of its judiciary.

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3. So that there can be no misunderstanding, PMC notes that it believes that a "merit selection" process—in which a nominee chosen by the governor from a list of persons recommended by a nonpartisan committee, if confirmed by the Senate, serves a relatively brief term and then runs for a full term in a retention (yes/no) election—is preferable to an elective judicial system. The relative merits of elective and merit selection systems, however, are not at issue in this case.



## II. THE ANNOUNCE CLAUSE IS NECESSARY TO ACHIEVE THE FACT AND APPEARANCE OF JUDICIAL IMPARTIALITY

To go back to first principles by discussing judicial impartiality and quoting Chief Justice Marshall and Alexander Hamilton would seem gratuitous as platitude. And yet, petitioners seem bent on abandoning or at least ignoring first principles, for the result they seek—the invalidation of the announce clause—would result in campaign rhetoric that would undermine and ultimately destroy public confidence in the impartiality of the judiciary.

### A. Both Common Sense And Experience Demonstrate That Campaign Statements Made Under The Pressure To Win Votes Can Undermine Public Confidence In The Impartiality Of The Judiciary

There is no question that judicial candidates are placed under great pressure during election campaigns to signal how they would rule on issues likely to come before them if elected. While many candidates can be trusted to preserve the public's confidence in the impartiality of the judiciary by refraining from announcing their predispositions or conclusions regarding these issues, many others cannot resist the pressure, as evidenced by the following examples of recently sanctioned conduct:

- distributing material that invited the electorate to "imagine a judge who [would] go to bat for [law enforcement]," that claimed that the candidate would "always have the heart of a prosecutor," and that predicted that "defense attorneys would not be happy" with the candidate on the bench. *In re McMillan*, 797 So. 2d 560, 562-63 (Fla. 2001);

- campaigning as a judge who "favors the death penalty for convicted murderers." *In re Judicial Campaign Complaint Against Burick*, 705 N.E.2d 422, 425

(Comm'n of Five Judges Appointed By Supreme Court of Ohio 1999);

- assuring that candidate would not "experiment with alternative sentences or send convicted child molesters home for the weekend . . . . Criminals belong in jail, not on the street." *In re Polito*, 1998 WL 939714, at * 1 (N.Y. Comm'n Jud. Conduct Dec. 23, 1998);
- promising to "stop suspending sentences" and to "stop putting criminals on probation." *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997); and
- distributing campaign literature that included the statements "The Authentic Right to Life Judicial Candidate," "Life . . . The Verdict For All Of God's Children" and that the candidate "Needs and Deserves the Support Of All Who Cherish Life." *In re Mullin*, 2000 WL 1603819, at * 1 (N.Y. Comm'n Jud. Conduct Sept. 25, 2000).

All of these statements announce a predisposition that leaves very little doubt as to how the candidate would decide cases likely, if not certain, to come before the candidate if elected. In doing so, each of the statements calls into question the candidate's ability and desire to be impartial and to decide each case on its particular facts and according to the law—to honor the principle that an accused is presumed innocent until proved guilty beyond a reasonable doubt; to fashion a sentence according to the particularized facts and consistent with the discretion available to a judge; to recognize that, under the law as determined by this Court, women have the right, within limits, to an abortion, albeit profound and sincere disagreement exists as to whether that should be the law.

The facts of *Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 944 F.2d 137 (3d Cir. 1991) are particularly instructive on the necessity of the announce clause if judicial impartiality is not to be undermined by campaign rhetoric. *Stretton* involved a First Amendment challenge to Pennsylvania's announce clause, which is identical to the Minnesota clause at issue in this case. *See* Pennsylvania Code of Judicial Conduct Canon 7(B)(1)(c).



In 1991, shortly before a judicial election, the United States District Court for the Eastern District of Pennsylvania enjoined enforcement of Pennsylvania's announce clause. *See Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 763 F. Supp. 128, 131 (E.D. Pa. 1991). The district court's injunction was later vacated by the Third Circuit Court of Appeals, but not until it had been in place for nearly five months. *See Stretton*, 944 F.2d at 144.

During the period the injunction was in effect, several judicial candidates availed themselves of the opportunity to "announce their views on disputed legal or political issues." Some of the results, as reported in a candidates' forum published in a Lancaster County, Pennsylvania newspaper, were as follows:

> Q: Do you have any significant concerns about police overstepping their authority in gathering evidence, taking statements, or building cases? In your experience, is the testimony of police officers in Lancaster County more or less reliable than that of defendants?
>
> A: [Judicial Candidate Reinaker:] There is no question in my mind that the testimony of police is more reliable than defendants. I've seen very little evidence that our law enforcement officers overstep their bounds. The incident of brutality [in] Los Angeles is unfortunate, but it tarnished the reputation of a whole field of people. I talk to children about drug abuse, and not long after that incident, kids were asking whether they can trust police. That's sad. There's not that cause for concern here.
>
> * * *

> Q: In your view, are Christmas celebrations appropriate in the county courthouse?
>
> A: [Judicial Candidate Mecum:] Yes, those celebrations are appropriate. I've been to several myself. I don't think Christmas should be celebrated to the exclusion of others. If other religions want to have similar celebrations, that's fine. This doesn't "establish" a religion to the detriment of others. It's harmless. It's like putting "In God We Trust" on our coins.

Ernest Schreiber, *Judge Candidates Speak Out About Abortion, the Death Penalty, and Other Issues*, Lancaster *New Era*, May 15, 1991.

Of course, such statements are not surprising; they are what one would expect in the heat of a gubernatorial or legislative election campaign. In judicial campaigns, however, these types of statements do grave harm to the actual and perceived impartiality of the judiciary. As the Third Circuit observed in *Stretton*, it "requires no extended discussion to demonstrate the damage" these types of statements do to public respect for the judgments of the courts:

> If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached after a fair hearing, giving due consideration to the arguments and evidence produced by all parties no longer would apply and the confidence of the public in the rule of law would be undermined.

944 F.2d at 142. The Eighth Circuit rightly came to the same conclusion in its decision below. *See Kelly*, 247 F.3d at 870 (summarizing evidence of "the threat to the integrity or reputation of the judiciary from involvement with partisan politics").



The necessity of some constraints on judicial candidates' statements, like those set forth above, cannot reasonably be questioned. An elective judicial system with no formal limits on announcements of candidates' predispositions will quickly turn into a "race to the bottom" in which candidates, willingly or begrudgingly, announce how they would rule on particular issues if elected. There can be no confidence in the impartiality of the judiciary—there can be only skepticism and doubt—when that occurs.

### B. The Pledges Or Promises Clause Is Insufficient To Protect The Impartiality Of The Judiciary

Petitioners and the *amici* supporting them assure the Court that the "pledges or promises" clause of Canon 5(A)(3)(d)(i), which prohibits the making of "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," imposes a proper and sufficient limit on campaign rhetoric so as to render the announce clause unnecessary.[4] *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 35, 37-38; Brief of *Amici Curiae* State Supreme Court Justices, at 14-15, 28-30. Petitioners' argument in this regard is conspicuously understated, perhaps because the principal case upon which they rely for the unconstitutionality of the announce clause held the pledges or promises clause unconstitutional as well. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228-30 (7th Cir. 1993). Regardless, it is clear that the pledges or promises clause, while necessary to the protection of judicial impartiality, is insufficient to achieve that end.

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4. In addition, petitioners suggest that impartiality can be sufficiently guarded in specific cases by, among other mechanisms, motions to disqualify or recuse judges that might be partial. *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 9-10, 38. Such protections are no substitute for the announce clause, however, as they do nothing to further the state's compelling interest in maintaining public confidence in the impartiality of the judiciary.

As the Eighth Circuit correctly determined, the pledges or promises clause does not reach the full range of campaign rhetoric that can undermine the actual and perceived impartiality of the judiciary:

> To be sure, the pledges and promises provision of Canon 5(A)(3)(d)(i) addresses the type of campaign conduct that most blatantly subverts the judicial office—pledges by candidates to make specific decisions on the bench. However, it does not reach the full range of campaign activity that can undermine the State's interests in an independent and impartial judiciary. It would not, for example, reach declarations by candidates that legislation relating to hot-button social issues is or is not constitutional. It also would not apply to candidates who publicized their opinions about how unsettled legal issues should be resolved. Both instances raise the specter that the candidates are declaring how they would decide questions that might come before them as judges in order to gain support for their candidacies.

*Kelly*, 247 F.3d at 877.

The correctness of the Eighth Circuit's conclusion in this regard is demonstrated by the circumstances surrounding the *Stretton* case, discussed above. While the district court in that case invalidated Pennsylvania's announce clause, the pledges or promises clause—which is identical to Minnesota's clause—was not challenged and remained in effect. *See Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 763 F. Supp. 128, 131 (E.D. Pa.), *vacated in part*, 944 F.2d 137 (3d Cir. 1991). Mindful that they were still prohibited from making "pledges or promises of conduct in office," several candidates felt free—and were in fact able without fear of sanction—to announce their views on police misconduct, religious displays, and other issues, as discussed above. *See supra* at 13-14.

Simply put, the Court need not speculate about whether the announce clause is necessary to the protection of judicial



impartiality or whether the pledges or promises clause is a sufficient measure. Experience has demonstrated the necessity of the announce clause and the insufficiency of the pledges or promises clause, which on its face does not reach the range of campaign rhetoric that must be proscribed if the actual and perceived impartiality of the judiciary is to be protected.

## III. THE ANNOUNCE CLAUSE, PROPERLY CONSTRUED, DOES NOT VIOLATE JUDICIAL CANDIDATES' FIRST AMENDMENT RIGHTS

### A. The Courts Below And The Minnesota Supreme Court Have Definitively Construed The Announce Clause

The district court below construed the announce clause to prohibit only "discussion of a judicial candidate's predisposition to [sic] issues likely to come before the court." *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 967, 986 (D. Minn. 1999). The Eighth Circuit affirmed the district court's interpretation. *See Kelly*, 247 F.3d at 881-83. Of critical importance to this Court, the Minnesota Supreme Court has recently adopted the Eighth Circuit's narrow construction of the announce clause and has therefore put to rest any doubt regarding the clause's proper interpretation. *See In re Code of Judicial Conduct*, ___ N.W.2d ___, No. C4-85-697, 2002 WL 126537 (Jan. 29, 2002) ("[T]he announce clause of Canon 5(A)(3)(d)(i) shall be enforced in accordance with the interpretation of that clause by the United States Court of Appeals for the Eighth Circuit in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001).").

Petitioners argue that the courts below improperly adopted this limiting construction because, they assert, the announce clause is unambiguously broad and therefore not "readily susceptible" to a limiting construction and because the Minnesota Supreme Court has implicitly adopted a broad interpretation of the clause inconsistent with the

limiting construction. *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 26-29. These arguments are unavailing in light of the Minnesota Supreme Court's recent order adopting the Eighth Circuit's narrow construction of the announce clause. Because federal courts, including this Court, must respect the interpretation of state law announced by the highest judicial tribunal of the state, the announce clause's proper construction is no longer at issue in this case. *Cf. Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *North Carolina v. Butler*, 441 U.S. 369, 376 n.7 (1979); *Brown v. Ohio*, 432 U.S. 161, 167 (1977). The only issue before the Court is whether the announce clause—as construed by the courts below and by the Minnesota Supreme Court—violates the First Amendment. For the reasons discussed below, it does not.

### B. As Construed By The Courts Below And By The Minnesota Supreme Court, The Announce Clause Is Narrowly Tailored And Therefore Does Not Violate The First Amendment

#### 1. The Announce Clause Prohibits Only Statements Of Predisposition On Issues Likely To Come Before The Court, Not Discussions Of Issues

The construction set forth by the courts below and adopted by the Minnesota Supreme Court limits the text of the announce clause in two important ways: it limits the *type* of speech proscribed to statements of "predisposition," and it limits the *scope* of issues covered to those that are "likely to come before the court." Drawing on the precedents of the Minnesota Board of Judicial Standards, the Eighth Circuit clarified the wide range of speech that is not proscribed by the announce clause thus construed. Speech that demonstrates a candidate's knowledge of the law and judicial precedent, details a candidate's judicial philosophy, or sets forth his or her views on issues of judicial administration is entirely permissible. *See Kelly*, 247 F.3d at 882. Candidates' discussion of their character, fitness, integrity, background (other than political party affiliation), education, legal experience, and work habits is likewise not proscribed. *See id.*



Inexplicably, petitioners and the *amici* supporting them ignore the fact that the courts below construed the announce clause to proscribe only statements of *predisposition* rather than general discussions of issues. Instead, petitioners assume that the announce clause prohibits "the public expression of general views on disputed legal and political issues." Brief for Petitioners Republican Party of Minnesota, *et al.*, at 8. Although petitioners acknowledge in passing the construction limiting the announce clause to statements of predisposition, they never deal with its import but rather proceed to cast the announce clause in the broadest possible terms.[5]

In arguing that the announce clause is grossly overbroad, petitioners and the *amici* supporting them rely heavily on *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993). *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 21-23; Brief of *Amici Curiae* American Civil Liberties Union and Minnesota Civil Liberties Union, at 11-13. In *Buckley*, the Seventh Circuit held that Illinois' announce clause, which was at the time identical to the clause at issue here, violated the First Amendment right to free speech of a judge running for election to the Illinois Supreme Court. *See Buckley*, 997 F.2d at 230. The court acknowledged the compelling interest underlying the announce clause, but went on to conclude that, in furthering

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5. Petitioners rely on dictum from a Minnesota Supreme Court opinion deciding an issue under Minnesota's election law to support their broad reading of the announce clause. *See* Brief for Petitioners Republican Party of Minnesota, *et al.*, at 24-26 (discussing *Bundlie v. Christensen*, 276 N.W.2d 69 (Minn. 1979)). As discussed above, however, the Minnesota Supreme Court has now clarified that the announce clause is to be construed narrowly, and petitioners' argument must therefore fail.

this interest, the announce clause "gags" the judicial candidate:

> He can say nothing in public about his judicial philosophy; he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. He cannot criticize *Roe v. Wade*. He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability—or for that matter about laissez-faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform. All these are disputed legal or political issues.

*Id.* at 228 (citation omitted). In sum, according to the *Buckley* court, the judicial candidate's "only safe response . . . is silence." *Id.* The court likewise concluded that construing the announce clause to proscribe only announcements of views on "issues likely to come before the court" has no effect on the clause's scope because "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." *Buckley*, 997 F.2d at 229. Convinced that the announce clause requires "complete silence" on the part of judicial candidates, the court declared the clause unconstitutional as overbroad. *See id.* at 231.

*Buckley* presents an immediate problem for petitioners in that it dealt primarily with the interpretation of the announce clause in the absence of binding Illinois authority. *See Buckley*, 997 F.2d at 229-31. The primary issue addressed by the court was whether the announce clause was to be construed "literally" or with a limiting construction. *See id.* at 228, 230. As discussed above, the Minnesota Supreme Court has answered that question: the announce clause is to be construed in accordance with the limiting construction set forth in the Eighth Circuit's



opinion below. *See In re Code of Judicial Conduct*, ___ N.W.2d ___, No. C4-85-697, 2002 WL 126537 (Jan. 29, 2002).

Thus, *Buckley* did not decide the issue presented in this case, *i.e.*, whether the announce clause is constitutional when read as proscribing only statements by judicial candidates of their "predispositions" on issues likely to come before the court. Instead, *Buckley* specifically held that it would *not* decide that issue because it "was not authorized" to construe the announce clause "as might be necessary to render it constitutional." *Buckley*, 997 F.2d at 230. Consistent with, and emphasizing, this conclusion, the *Buckley* court distinguished *Stretton* on the grounds that the Third Circuit "seems to have understood the [announce clause] to be confined to campaign statements that would leave the impression that a case had been 'prejudged.'" *Buckley*, 997 F.2d at 230. Thus, the *Buckley* court held the announce clause unconstitutional primarily because it was not willing to construe the clause as the Court is bound to construe it in this case—as limited to *statements of predisposition* on issues likely to come before the court.

The *Buckley* court failed to explain why it regarded itself as "not authorized" to construe the announce clause narrowly beyond citing a law review article on the dangers of federal courts assuming the role of a Council of Revision. *See Buckley*, 997 F.2d at 230. It was this failure that caused the Eighth Circuit below to find *Buckley* unpersuasive. As the court noted, "*Buckley* gives little heed to 'our task [as courts] to construe [laws] so as to comport with constitutional limitations' if consistent with the will of the lawmaker.'" *Kelly*, 247 F.3d at 881 n.24 (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 571 (1973)). *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("The elementary rule is that every reasonable construction must be resorted to in order save a statute from unconstitutionality.").

Had *Buckley* heeded this Court's admonition and construed the announce clause narrowly, as the courts below in this case did and as the Minnesota Supreme Court has now definitively done, it should have upheld the clause, for the purpose of the announce clause is to protect the impartiality of the judiciary and its language is readily susceptible to a limiting construction in furtherance of that purpose.

Canon 1 of the Minnesota Code of Judicial Conduct provides that the provisions of the Code should be construed to further the Code's overall purpose:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and personally observe those standards in order to preserve the integrity and independence of the judiciary. *The provisions of this Code should be construed and applied to further that objective.*

Minnesota Code of Judicial Conduct Canon 1 (emphasis added). The *Buckley* court ignored this directive. The court duly acknowledged the purpose of the announce clause:

> [T]he concern [as stated by defendants' counsel] which animates the rule is precisely that a candidate in a judicial election might, in order to attract votes or to rally his supporters, make commitments to decide particular cases or types of cases in a particular way and having made such a commitment would be under pressure to honor it if he won the election and such a case later came before him. This commitment, this pressure, would hamper the judge's ability to make an impartial decision and would undermine the credibility of his decision to the losing litigant and to the community.

997 F.2d at 228. Having acknowledged the purpose of the announce clause, however, the court proceeded to construe



the clause so literally as to invalidate it and thereby defeat the clause's purpose.

A chief failing of both *Buckley* and the arguments of petitioners is the failure to recognize that the announce clause, on its face, is narrowly tailored by virtue of its limitation to "announcements" of views. Moreover, the clause can readily be limited to prohibit only statements of predisposition—as the courts below and the Minnesota Supreme Court have done—so as to make its constitutionality as a narrowly tailored proscription even more clear. *Buckley*, in contrast, focused almost exclusively on the meaning of "issues," arguing that "search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability—or for that matter about laissez faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform" are all issues the discussion of which is prohibited. 997 F.2d at 228.

The announce clause need not be read to prohibit discussion of any of these issues. The obvious and most logical interpretation of the clause's prohibition of "announc[ing] views" is that candidates may not announce their *conclusions* or *predispositions* regarding such issues: the prohibition is of statements by candidates of how an issue should ultimately be decided. Under this construction of the announce clause, which has been adopted by the Minnesota Supreme Court, candidates may discuss case law on search and seizure or any other issue likely to come before the court. *See Kelly*, 247 F.3d at 882. What they may not do is go the final step; they may not state their conclusions regarding, or their predispositions as to how they would decide, such issues.

The rationale for this distinction is simple: discussions of issues demonstrate judicial candidates' knowledge and experience, while announcements of conclusions or predispositions undermine public confidence in candidates' willingness and ability to be impartial. It is entirely possible for

judicial candidates to discuss issues without undermining the public's confidence in their impartiality. While the public is entitled to know whether judicial candidates appreciate issues and understand arguments pro and con, the public must also have confidence that, if elected, the candidates will consider issues with an open mind and will impartially weigh arguments elucidated by the facts and briefing in particular cases without prejudgment or predisposition. This confidence is what the announce clause protects.

### 2. The Announce Clause Is Not Unconstitutionally Vague

Petitioners argue that the interpretation of the announce clause discussed above is unconstitutionally vague. *See* Brief for Petitioners Gregory F. Wersal, *et al.*, at 39-40. This is simply not the case. While the announce clause is not susceptible to a bright line interpretation—no sensible rule governing these matters could be—it has proved to be a completely workable standard.

Perhaps the best proof that a rule, such as the announce clause, is workable when understood to permit discussion of issues but not announcement of predispositions is the confirmation process for the federal judiciary. Many of the Justices of this Court, during their confirmation hearings before the United States Senate, discussed disputed legal and political issues without announcing their conclusions regarding, or their predispositions as to how they would decide, such issues. *See, e.g., Hearings Before the Senate Comm'n on the Judiciary on the Nomination of Sandra Day O'Connor to be Associate Justice of the Supreme Court of the United States*, 97th Cong., 1st Sess. 61-63, 79, 98, 107-08, 125, 127, 134 (1981) (nominee Sandra Day O'Connor discussing case law and scholarship regarding constitutional right to privacy and abortion but declining to state a conclusion as to whether *Roe v. Wade* was correctly decided); *Hearings Before the Senate Comm'n on the Judiciary on the Nomination of Ruth Bader Ginsburg to be Associate Justice*



*of the Supreme Court of the United States*, 103d Cong., 1st Sess. 121-22, 124, 136-37, 165-68, 243-44 (1993) (nominee Ruth Bader Ginsburg discussing case law and her general views on gender discrimination but declining to state a conclusion as to whether strict scrutiny should be applied to gender based classifications); *Hearings Before the Senate Comm'n on the Judiciary on the Nomination of Stephen G. Breyer to be Associate Justice of the Supreme Court of the United States*, 103d Cong., 2d Sess. 110-14 (1994) (nominee Stephen G. Breyer discussing case law and commentary on Fifth Amendment takings clause generally but declining to state specific conclusions as to this matter).

If petitioners and the *Buckley* court were correct, virtually every member of this Court has repeatedly violated applicable canons of professional conduct during the confirmation process. *See generally* Model Rules of Professional Conduct Rule 8.2(c). This, of course, is absurd. The Justices of this Court—like judicial candidates in Minnesota, Pennsylvania, and elsewhere—are perfectly capable of walking the line the announce clause draws, and petitioners' suggestion to the contrary is unwarranted. The announce clause as construed by the courts below and by the Minnesota Supreme Court is therefore not unconstitutionally vague.

## CONCLUSION

Every judge, whether appointed or elected, has an equally strong obligation to be and to appear impartial—an obligation fundamental to our system of justice and necessarily at odds with campaign rhetoric that signals candidates' conclusions or predispositions on issues they may be called upon to decide if elected. The announce clause of Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct, as definitively interpreted by the Minnesota Supreme Court, is narrowly tailored to further Minnesota's interest in protecting the impartiality of its judiciary, and therefore does not violate the First and Fourteenth Amendments of the United States Constitution.

The decision of the Eighth Circuit Court of Appeals should therefore be affirmed.

Respectfully submitted,

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